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The Status of Pending Air Carrier Litigation

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THE STATUS OF PENDING AIR CARRIER LITIGATION

BARRY F. BENSON AND JILL DAHLMANN ROSA*

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I. INTRODUCTION

THIS ARTICLE will review significant developments that occurred during the year 2000 in air carrier litigation involving both domestic and foreign carriers. Three airlines had major accidents: Alaska Airlines, Air France, and Singapore Airlines. The most significant development in the law involved changes in the jurisdictional scope and recovery permitted under the Death on the High Seas Act (DOHSA).¹ Passengers on commercial aircraft may now recover damages under DOHSA for certain non-economic losses that were formerly not recoverable.²

II. SINGAPORE AIRLINES FLIGHT SQ006 (OCTOBER 31, 2000)

Singapore Airlines Flight SQ006 to Los Angeles, a Boeing 747-400 aircraft, crashed and caught fire during takeoff from Chiang Kai-shek International Airport, Taipei, Taiwan, on October 31, 2000. Of the 179 people on board, 159 passengers and 20 crewmembers, 83 were killed and at least 68 were injured. Forty-seven U.S. citizens were on-board the flight, and of that number, 23 survived. The other passengers on the flight were mostly from Singapore or Taiwan. The flight was on the wrong runway, 05-R instead of 05-L, and hit a concrete barrier and some construction equipment approximately 4000 feet into its takeoff roll.³ The crew apparently realized there was something on the runway seconds before the aircraft crashed into the equipment and broke in two. Immediately after the first officer called "Vee one," the captain said, "[S]omething there." Even

¹ Death on the High Seas Act, 46 U.S.C.A. app. §§ 761-68 (West 2001).

² *Id.* § 761(b).

³ *Investigation to Focus on Human Factors and Emergency Evacuation*, AIR SAFETY WEEK, March 5, 2001, available at 2001 WL 5390912.

though the aircraft caught fire, rescuers managed to pull dozens of passengers from the wreckage.

Several minutes before the attempted takeoff of SQ006, Chiang Kai-shek Airport was reporting heavy rain with wind gusts up to 64 miles per hour (mph). Runway visibility was reported at less than a quarter mile.⁴ Chiang Kai-shek Airport control tower has no ground radar. A crewmember who survived the accident admitted the pilot knew that the aircraft had been assigned Runway 05-L for takeoff. Airport officials admitted there was no barrier set up to prevent an aircraft from taxiing onto the closed runway.⁵ Taiwan aviation officials stated that the runway was not blocked because some of it was being used as a taxiway.⁶ There are conflicting reports as to whether the lights to the closed runway had been turned on with Typhoon Xangsane approaching the island,⁷ or whether the closed runway was correctly lit as a taxiway in accordance with international requirements.

Prior to the accident, Singapore Airlines had no fatal crashes in its 28-year history. Singapore Airlines accepted that its aircraft was on the wrong runway at the time of the crash⁸ but also called for an investigation as to how this could have occurred. Further, the airline called for a review of the facilities at Taiwan's airport.⁹

On February 23, 2001, the Taiwanese Aviation Safety Council (ASC) released a preliminary factual report on the accident.¹⁰ Although the investigators reached no conclusions about the cause of the accident, they mentioned a number of actions and omissions by the pilots and Chiang Kai-shek International Airport staff that may have contributed to the disaster. The ASC appeared to rule out mechanical problems with the aircraft, al-

⁴ AVweb News Wire, *At Least 79 Killed in Singapore Airlines 747 Crash in Taiwan* (Nov. 2, 2000), available at <http://www.avweb.com/newswire/news0044b.html>.

⁵ *Id.*

⁶ AVweb News Wire, *Ground Video May Hold the Clue in the Crash of Singapore Airlines Flight SQ006* (Nov. 13, 2000), available at <http://www.avweb.com/newswire/news0046a.html>.

⁷ Airwise News, *Singapore Crash—Were Closed Runway's Lights On?* (Nov. 6, 2000), available at <http://news.airwise.com/stories/2000/11/973514060.html>.

⁸ Airwise News, *Singapore Airlines Accepts Responsibility for Crash* (Nov. 12, 2000), available at <http://news.airwise.com/stories/2000/11/973336203.html>.

⁹ South China Morning Post, *SIA Crash Probe May Take a Year* (Nov. 14, 2000), available at <http://www.singapore-window.org/sw00/001114sc.htm>.

¹⁰ *SQ006 Accident Investigation Factual Data Collection Group Report*, available at http://www.asc.gov.tw/uw/uw_disp.exe/easc/home/asc/frame.html?cat_oid=@350—2—0.

though the failure of doors and escape slides is one area of focus of the investigation.

The report states that the flight crew knew that Runway 5-R was closed for construction work. The crew all thought they were on Runway 5-L for takeoff. In fact, they told the control tower five times that they were on 5-L. The crew had mistakenly followed a curving line of green lights onto Runway 5-R while they were trying to get to 5-L, and ignored the onboard runway guidance computer (the Parallel Visual Display), which was activated but did not indicate that the aircraft was properly lined up with the runway.

The ASC report stated that Runway 5-R did not have a sign indicating that it was closed. The report noted faults with the lights and lines down the center of the taxiway leading to Runways 5-L and 5-R. One of the ground lights leading to 5-L was out and another was very dim. The broken and dim lights were positioned near the point where the pilots mistakenly turned onto the wrong runway. Runway 5-L also lacked flashing yellow guard lights at the intersection with the taxiway, which would indicate that it was a low-visibility runway. The broad white stripes marking the threshold to 5-R had not been covered, and the runway centerline lights were on. In interviews with investigators, the pilots said they went down Runway 5-R because it "looked correct," and they didn't take particular notice of any signs or numbers. They stated they believed a closed runway would have no lights.

There are three groups of cases arising out of this accident. First, are the cases governed by the Warsaw Convention for which there is Article 28 Treaty Jurisdiction in the United States. The families of at least seven people killed in the accident have filed no fewer than twelve lawsuits against the airline. The majority of these cases are in the U.S. District Court for the Central District of California.¹¹ The Judicial Panel on Multi-district Litigation (MDL) assigned the cases to Judge Gary A. Feess, Central District of California, for consolidated discovery proceedings.

Second are the Warsaw Convention cases where there is no treaty jurisdiction in the United States. In one such case, an Australian woman injured in the crash filed suit in the United

¹¹ *Lawsuits Mount Against Singapore Airlines Following Taiwan Crash*, AGENCE FR.-PRESSE, Feb. 27, 2001, available at 2001 WL 2350628.

States.¹² Her complaint states that Singapore Airlines is a member of the Star Alliance consortium, which includes United Airlines, Air Canada, Lufthansa German Airlines, and All Nippon Airways, and that the Star Alliance is a "carrier" as defined by the Warsaw Convention.¹³ Therefore, she alleges, there is Treaty jurisdiction in the United States because it is the domicile of the Star Alliance.

Third are cases arguably outside the Warsaw Convention altogether because Taiwan is not a High Contracting Party to the Convention. These would generally include those passengers who purchased round-trip tickets from Taiwan to Los Angeles.¹⁴ The Ninth Circuit previously held Taiwan is not bound by the People's Republic of China's adherence to the Convention and its declaration that it shall apply to the entire Chinese territory.¹⁵

The airline has offered \$400,000 to each of the families of the 83 passengers who were killed in the crash.¹⁶ This offer extends to all families, regardless of the passenger's domicile. Some of the families have accepted the offer, while others have rejected

¹² *Australian Injured in Taiwan SIA Crash Wants Case Heard in US Court*, AIRLINE INDUS. INFO, Feb. 23, 2001, available at 2001 WL 3339601.

¹³ *Id.*

¹⁴ The Warsaw Convention governs international transportation by aircraft. See The Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention]. International transportation is defined as:

any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

Id. ch. I, art. 1(2).

¹⁵ *But see* Atl. Mut. Ins. Co. v. Northwest Airlines, Inc., 796 F. Supp. 1188 (E.D. Wis. 1992) (holding that Taiwan was part of the People's Republic of China and thus a party to the Warsaw Convention).

¹⁶ Airwise News, *Singapore Announces Compensation Offer* (Nov. 4, 2000), available at <http://news.airwise.com/stories/2000/11/973343693.html>.

it.¹⁷ The airline has also offered \$20,000 to those passengers who were not injured or who received minor injuries.

III. AIR FRANCE CONCORDE FLIGHT 4590 (JULY 25, 2000)

Air France Concorde Flight 4590 crashed on takeoff from Paris's Charles de Gaulle Airport on July 25, 2000. All 109 people on board were killed as well as five people on the ground. The Concorde crashed into a small hotel after the crew apparently lost control of the aircraft. Most of the passengers were German tourists traveling to New York to board a cruise ship.

The French Government launched a two-pronged investigation: one by civil aviation authorities, the French Accident Investigation Bureau (BEA), and the other by a three-judge panel to determine if there are any potential criminal charges because of the crash.¹⁸ In its interim report, the BEA found that shortly before rotation, the right front tire of the left main gear blew after running over a strip of metal, and that pieces of the Concorde's tire punctured the fuel tank on the underside of the wing.¹⁹ French authorities are still attempting to determine what caused the leaking fuel to ignite, but they theorize that the fuel was ignited by a spark from electrical wiring or by hot gases from one of the aircraft's engines.²⁰

A 16-inch titanium strip, called a "wear strip," was found on the runway following the accident. French authorities believe the strip was part of an engine assembly that fell off a Continental DC-10 that departed prior to the Concorde.²¹ Continental has not yet determined whether the strip came from one of its aircraft. The wear strip was from a General Electric engine, and is not peculiar to DC-10 aircraft. Air France has filed suit against Continental in France.

¹⁷ Airwise News, *Families Reject Singapore Compensation Offer* (Nov. 5, 2000), available at <http://news.airwise.com/stories/2000/11/973421848.html>.

¹⁸ AVweb News Wire, *And Now Concorde, Piece By Piece* (Nov. 13, 2000), available at <http://www.avweb.com/newswire/news0046a.html>.

¹⁹ The Interim Report is available at <http://www.bea-fr.org/anglaise/concorde-en.html>.

²⁰ Airwise News, *Supersonic Jet Operators Hope To Prove Concorde is Safe to Fly* (Dec. 15, 2000), available at <http://news.airwise.com/stories/2000/12/976885024.html>.

²¹ Airwise News, *New Theory in Concorde Disaster* (Oct. 24, 2000), available at <http://news.airwise.com/stories/2000/10/972383770.html>.

Air France has agreed to settle the lawsuits of the majority of the German passengers.²² All parties agreed to keep the settlement amount secret, but sources have reported that the amount is \$1.2 million per passenger, resulting in a total settlement of more than \$115 million for the ninety-six passengers killed.²³ One German attorney had previously said he expected Air France to pay close to \$3 million per victim in compensation.²⁴

Several lawsuits have been filed in federal courts in New York and the Southern District of Florida, naming Air France, Continental Airlines, McDonnell Douglas, Aerospatiale Marta, Inc., BAE (British Aerospace), Goodyear Tire & Rubber, Boeing, General Electric, and Middle River Aircraft Systems as defendants.²⁵ The suit against Goodyear, the tire manufacturer, alleges that Goodyear failed to correct problems with the tires despite numerous reports of blowouts.²⁶ A pre-filing discovery proceeding in Texas state court was removed to federal court. Plaintiffs are seeking remand of that proceeding.

Air France and British Airways initially grounded their remaining Concorde aircraft until the cause of the crash had been determined.²⁷ Both airlines are in the process of conducting flight tests on the Concorde, and hope to return the aircraft to service in 2001. The safety enhancements may include Kevlar fuel tank liners and tire guards.²⁸

²² Airwise News, *Concorde Victims' Families Agree on Compensation* (May 13, 2001), available at <http://news.airwise.com/stories/2001/05/989790184.html>.

²³ News Briefs, 15 AIR SAFETY WEEK 9 (Apr. 23, 2001).

²⁴ Airwise News, *Lawyer Expects USD\$3m Compensation Payments for Concorde Victims* (Sept. 2, 2000), available at <http://news.airwise.com/stories/2000/09/967921055.html>.

²⁵ Airwise News, *Air France, Continental and Seven Others Sued Over Concorde Crash* (Sept. 29, 2000), available at <http://news.airwise.com/stories/2000/09/970221863.html>.

²⁶ Susan R. Miller, *Concorde Crash Suit Targets U.S. Companies*, NAT'L L.J., Oct. 16, 2000, at A7.

²⁷ Airwise News, *New Clue in Concorde Crash Investigation* (Aug. 4, 2000), available at <http://news.airwise.com/stories/2000/08/965424166.html>. For facts and statistics on the flight crew, the aircraft, and an analysis of the crew's communications and actions during the accident sequence, see AVweb News Wire, *French Authorities Report On Concorde* (Sept. 4, 2000), available at <http://www.avweb.com/newswire/news0036a.html>.

²⁸ AVweb News Wire, *Concorde Back in 2001* (Dec. 18, 2000), available at <http://www.avweb.com/newswire/news0051a.html>.

IV. ALASKA AIRLINES FLIGHT 261 (JANUARY 31, 2000)

On January 31, 2000, Alaska Airlines Flight 261 crashed into the Pacific Ocean off the coast of California while en route from Puerto Vallarta, Mexico, to San Francisco. The aircraft, a McDonnell Douglas MD-83, carried eighty-three passengers and five crewmembers. There were no survivors.

The horizontal stabilizer moved to an apparent full nose-down position as the crew disengaged the autopilot. According to the National Transportation Safety Board (NTSB), the data indicate that the plane dropped 7000 feet in one minute as the crew struggled to level it.²⁹ The crew got the aircraft under control at 24,000 feet, and descended in controlled flight to 18,000 feet. The plane then nose-dived at a sixty-degree angle within three seconds, eventually reaching an acceleration of negative-3 G's. The aircraft pitched to the left and went inverted, corkscrewing from 17,900 feet to the ocean in about one minute.³⁰

The cockpit voice recorder (CVR) contains thirty minutes of cockpit recording prior to impact.³¹ When the tape begins, the crew is already discussing a problem relating to the horizontal stabilizer. The CVR revealed the presence of two loud and unidentified noises. The first occurred before the aircraft completed its first rapid descent. Although the noise was not heard on the CVR, it was reported to the crew by the flight attendant, and the crew, in response, indicated they also heard the noise. While the crew continued to analyze the problem, the CVR recorded a loud noise that was believed to be the sound of the stabilizer breaking free. The crew then suddenly lost control of the aircraft, and the pilots indicated that the aircraft was inverted. Twenty seconds before impact, the captain said, "Gotta get it over again. At least upside down, we're flying." They were unsuccessful in their attempt to stabilize the aircraft in inverted flight, and the last recorded phrase on the CVR was the captain saying, "Ah, here we go."

The NTSB's investigation of the accident has focused on the suspected failure of a worn jackscrew assembly of the horizontal

²⁹ Statement by Jim Hall, Chairman, National Transportation Safety Board, on the Investigation of the Crash of Alaska Airlines Flight 261 (Feb. 8, 2000), *available at* <http://www.nts.gov/speeches/jhc000208.htm>.

³⁰ Airwise News, *NTSB Reveals More Details of Alaska Flight 261* (Feb. 9, 2000), *available at* <http://news.airwise.com/stories/2000/02/950102515.html>.

³¹ Statement by Jim Hall, *supra* note 29.

stabilizer, and the grease applied to it.³² The jackscrew is a 2-foot-long, 1½-inch-diameter threaded shaft that moves up and down through a stationary gimbal nut to adjust the stabilizer. The NTSB is investigating whether the type of grease used on the jackscrew may have caused a breakdown of the metal in the mechanism, or may have formed a pasty substance that picked up dirt and other foreign material that acted like a grinding compound on the jackscrew.³³ A Federal Aviation Administration (FAA) official testified at the NTSB hearing that the FAA could not provide any history on how the jackscrew assembly was approved, nor could they locate records of the process under which the part received approval.³⁴ Following the accident, the FAA ordered an inspection of those assemblies for more than 1000 MD-80 aircraft in the U.S. commercial fleet.

Investigators have also focused on a small control piece called an "end stop," which may have broken off the horizontal stabilizer mechanism. Boeing, which purchased McDonnell Douglas in 1997, has argued that the end stop fell off on impact.³⁵ There are questions regarding the service life of the end stop, and the apparent lack of redundancy. There have also been allegations that the decision of the flight crew not to land when the problems first surfaced was a contributing cause. The flight lasted approximately 2 hours and 45 minutes before it crashed.

Although the governor of Washington sought to move the NTSB's hearing from Washington, D.C., to Seattle or somewhere else on the West Coast, the hearing took place in D.C. during the week of December 11, 2000.³⁶

At least 50 wrongful-death claims are a part of the MDL action in the U.S. District Court in San Francisco. The cases have been assigned to Judge Charles Legge. Alaska Airlines, Boeing, Shell, and Equilon Enterprises (manufacturer of the grease allegedly used on the jackscrew) have been named as defendants. Pre-

³² Airwise News, *Alaska Crash Hearing Continues* (Dec. 14, 2000), available at <http://news.airwise.com/stories/2000/12/976797411.html>.

³³ Airwise News, *Safety Checks on Alaska MD-80 Jackscrew Lubrication* (Aug. 20, 2000), available at <http://news.airwise.com/stories/2000/08/966769065.html>.

³⁴ AVweb News Wire, *Alaska Airlines Flight 261: The Hearings* (Dec. 18, 2000), available at <http://www.avweb.com/newswire/news0051a.html>.

³⁵ Airwise News, *Boeing in the Frame in Alaska Airlines Crash Probe* (Nov. 20, 2000), available at <http://news.airwise.com/stories/2000/11/974726923.html>.

³⁶ Air Disaster.Com News, *NTSB Declines to Move Alaska Air Hearing to Seattle* (Nov. 13, 2000), available at <http://www.airdisaster.com/news/1100/13/news.shtml>.

filing administrative claims have been filed with the FAA alleging lack of oversight.

Alaska Airlines has offered to pay 100% of compensatory damages to settle all cases under applicable law.³⁷ This offer extends not only to passengers covered by the Warsaw Convention, but to the crew cases and non-ticketed airline employees. Alaska Airlines has already paid \$135,000 for each of the passengers covered by the Warsaw Convention.

Defendants Boeing and Alaska Airlines have filed motions to determine choice of law and to dismiss punitive damage claims. Plaintiffs' response to these motions presents several arguments regarding choice of law, including application of general maritime law because the accident allegedly occurred in navigable waters. Application of maritime law would allow plaintiffs to pursue claims for pre-impact pain and suffering, while application of California law would preclude such claims because California law has no survival action for wrongful death.³⁸ Application of maritime law might also allow plaintiffs to pursue claims for punitive damages. A hearing date on these motions is to take place in March 2001. The parties have served discovery requests, but the court has not yet set a response date.

V. EGYPTAIR FLIGHT 990 (OCTOBER 31, 1999)

On October 31, 1999, EgyptAir Flight 990, a flight from New York to Cairo, crashed in the Atlantic Ocean about 60 miles south of Nantucket Island, Massachusetts. The aircraft crashed into 250 feet of water, and approximately 90 percent of the wreckage by weight was recovered. All 217 people on board the Boeing 767-366ER airplane were killed in the crash. The flight had 199 passengers, 15 crewmembers, and three non-revenue employees. Passengers were from Canada, Egypt, Germany, Sudan, Syria, the United States, and Zimbabwe.

The last contact with the aircraft was approximately three minutes before the crash. There was no distress call. Radar data showed that during the last 37 seconds of the flight, the 767 aircraft descended abruptly from 33,000 feet to 16,000 feet,

³⁷ Airwise News, *Alaska Offers to Pay Compensation Awards to Flight 261 Families* (Sept. 22, 2000), available at <http://news.airwise.com/stories/2000/09/969613370.html>.

³⁸ CAL. CIV. CODE §§ 377.34, 377.61 (West 2001).

climbed back to 24,000 feet, and then began its final plunge.³⁹ It is believed that the aircraft began breaking up over the Atlantic Ocean at 10,000 feet. Data show that the aircraft reached its maximum nose-down pitch of 40 degrees, and stayed at that angle for four seconds. The 767 did not go supersonic but did reach Mach .94.⁴⁰ The flight data recorder also showed that the speed brakes were deployed.

There has been much speculation concerning the cause of the crash. Although the prevailing theory appears to be that the first officer deliberately crashed the aircraft, the Egyptian Government and EgyptAir have absolved the first officer and blamed the crash on mechanical problems.⁴¹ Similarly, attorneys representing various crewmembers maintain that some sort of mechanical problem or other difficulty could have caused the crash. They point out that it cannot be proven that the first officer was ever alone in the cockpit; even if he were, he would have locked the cockpit door following the captain's departure if he intended to bring down the aircraft.⁴²

The NTSB has yet to issue a probable cause for the accident, and the investigation is ongoing. The Board opened the public docket and has released a number of factual reports.⁴³ The Board determined that there was no need for a public hearing but has emphasized that no determination on the cause of the crash has been made. It is anticipated that a draft report will be circulated among the parties for comment in the spring of 2001. Carol Carmody, Vice Chairman of the NTSB, has said that the draft report is "probably not going to make [Egyptian authorities] happy."⁴⁴

The NTSB released 1655 pages on the crash, which listed all the evidence recovered in the investigation, including an inter-

³⁹ AVweb News Wire, *And Painful Memories Remain from Other Airline Tragedies: EgyptAir Flight 990 Remembered* (Oct. 30, 2000), available at <http://www.avweb.com/newswire/news0044a.html>.

⁴⁰ AVweb News Wire, *NTSB Disputes Reports of What Was Said* (Nov. 22, 1999), available at <http://www.avweb.com/newswire/news9947a.html>.

⁴¹ *Id.*

⁴² AVweb News Wire, *EgyptAir 990, The Never-Ending Story* (June 26, 2000), available at <http://www.avweb.com/newswire/news0026a.html>.

⁴³ The docket is available on the web page for the NTSB, <http://www.ntsb.gov/events/EA990/default.htm> (visited Aug. 16, 2001).

⁴⁴ Airsafetyonline, *EgyptAir Report Won't Please Egyptians—Official* (Mar. 12, 2001), available at <http://www.airsafetyonline.com/news/2001/03/12/1.shtml>.

pretation of the cockpit voice recording.⁴⁵ On the recording, the captain and first officer were alone in the cockpit when the captain left to use the restroom. Translators heard a word that was unintelligible, and then believe the first officer repeated the phrase, "I rely on God" eight times during a long series of thumps and clicks. Early reports that the first officer was heard to say, "I made my decision now. I put my faith in God's hands," were incorrect. The DFDR shows the autopilot was switched off and the engines shut down at this time. The captain returned and said, "What's happening? What's happening?," according to translators. The first officer did not answer him but again said, "I rely on God," as the thumps and clicks continued. The captain again asked him what was happening: "What is this? What is this? Did you shut the engines? Get away in the engines. Shut the engines." The first officer said, "It's shut." The CVR transcript indicates the captain responded: "Pull. Pull with me. Pull with me. Pull with me," before the plane crashed.

The final seconds of the aircraft's DFDR show that the elevator controls at the captain's position were set for a nose-up position, while the controls at the first officer's position were set for a nose-down position. The final readout shows that the elevator controls were back to normal when the recorder stopped.

The materials released to date contain some suggestions for a motive by the first officer, including his impending mandatory retirement and some unusual allegations of sexual misconduct from the staff at the New York hotel where the flight crew had stayed.

A number of the passengers were returning to Egypt on round-trip tickets purchased in Egypt. Under Article 28 of the Warsaw Convention, there is no treaty jurisdiction in the United States for those cases. Most of those cases have settled.

Some of those passengers, along with various crewmembers, have brought suit against Boeing (the aircraft's manufacturer), Pratt & Whitney (the engine manufacturer), and Parker Hannifin, Corp. for alleged mechanical defects. Pratt & Whitney has since been dismissed. In addition, various crewmembers have

⁴⁵ Translation of the cockpit voice recorded (CVR) took 130 hours and was accomplished by an NTSB contract interpreter, an FBI language specialist, members of the Egyptian delegation, and a State Department official. All participants, including the Egyptian Civil Aviation Authority and EgyptAir agreed to the translation. The transcript is available at <http://www.nts.gov/events/EA990/docket/EAContents.htm>.

brought direct actions against EgyptAir because there is no worker's compensation bar under Egyptian law.

In cases against EgyptAir where jurisdiction in the United States is proper, the Judicial Panel on Multi-district Litigation transferred those cases to Judge Frederic Block in the U.S. District Court for the Eastern District of New York.

It appears that the amendment to the Death on the High Seas Act (DOHSA) applies to this case. Under the amendment, plaintiffs can recover for loss of care, comfort, and companionship, as well as traditional pecuniary losses.

EgyptAir initially announced that the International Air Transport Association (IATA) Inter-carrier Agreement of 1997, which waives the airline's liability limit under the Warsaw Convention, would not bind it. EgyptAir had signed the agreement, but had not filed a tariff incorporating the Agreement with the Department of Transportation, as required by Transportation Department regulations.⁴⁶ EgyptAir later changed its position and agreed to be bound by the agreement.⁴⁷ This comports with the ruling of Judge Hupp (Central District of California) in the case arising out of the crash of Korean Airlines Flight 801 in Guam. Judge Hupp held that the airline's signature on the agreement, and the proclamation by the Director General of IATA that the agreement had taken effect, were sufficient to constitute an effective waiver of the damage limitation by the airline, regardless whether the airline filed the tariff.⁴⁸

EgyptAir announced in February 2001 that it will not contest liability and is willing to compensate some of the passengers under applicable law. This offer applies only to those cases in which jurisdiction and venue are proper in the United States. The airline has reserved its right to claims against other parties it believes caused the accident. Prior to EgyptAir's announcement, some preliminary liability discovery had taken place.

VI. AMERICAN AIRLINES FLIGHT 1420 (JUNE 1, 1999)

On June 1, 1999, American Airlines Flight 1420, an MD-82, overran the end of the runway while attempting to land in Little

⁴⁶ See generally Andreas F. Lowenfeld & Allan I. Mendelsohn, *The Egyptair Crash: A First View of the Law*, 222 N.Y.L.J. 114 (1999).

⁴⁷ Lee S. Kreindler, *Millennium to Bring Revolution in Compensating Airline Crash Victims*, 224 N.Y.L.J. 81 (2000).

⁴⁸ In re Air Crash at Agana, Guam, Civ. No. 97-7023, MDL No. 1237 (C.D. Cal. Oct. 19, 1998); cf. *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301(2d Cir. 2000), cert. denied, 150 L. Ed. 2d 716, 121 S. Ct. 2549 (2001).

Rock, Arkansas. Of the 145 people on board, 11 were killed, including the captain, and many others were injured.

Before and after takeoff, the flight crew received reports of thunderstorms in the Little Rock area, including a Convective SIGMET. Upon their first communication with the Little Rock Air Traffic Control Tower, the controller informed them that a thunderstorm was moving through the area. The winds were gusting up to 44 knots at that time.⁴⁹

The crew was planning to land on Runway 22L but, after the winds shifted, they decided to land on Runway 4R. The crew attempted a visual approach, but the captain lost visual reference to the runway. The crew then accepted vectors to the ILS approach. The Runway Visual Range (RVR) dropped to 3000 feet, and then to 1600 feet as the crew continued with the landing. Wind gusts increased to 45 knots, and the controller issued several windshear alerts and a report of heavy rain. Less than 500 feet above ground, the aircraft was blown off course by the strong crosswind. The plane landed in a crab position and immediately began to hydroplane on the runway. The surviving pilot described feeling a "tail slap" sensation as the strong crosswind pushed the aircraft on the runway. The pilots were unable to maintain directional control. The captain used reverse thrust in an effort to control the direction of the aircraft. The spoilers on the aircraft were not deployed. The crew did not regain control of the aircraft by the end of the runway, and the aircraft overran the runway, struck a landing light stanchion, broke apart, and caught fire.

Plaintiffs sued American Airlines in both state and federal court. State cases were filed in Arkansas, Texas, and Illinois. The federal cases have been consolidated for MDL proceedings in the U.S. District Court for the Eastern District of Arkansas before Judge Henry Woods. Plaintiffs allege that the negligence of American Airlines includes permitting the flight to depart despite fatigued pilots, attempting the approach and landing in dangerous weather conditions, failing to divert to a suitable alternate airport when advised of weather conditions at the Little Rock airport, failing to properly configure the aircraft on landing, and failing to establish and enforce policies and procedures relating to operation in areas of known or forecast thunderstorms, convective weather activity, and wind shear.

⁴⁹ The NTSB's factual reports on American Airlines Flight 1420 are available at <http://www.nts.gov/events/2000/aa1420/exhibit.htm>.

A. WARSAW CASES

Although the flight was domestic, there were a number of passengers returning from international trips whose claims fall under the Warsaw Convention. American Airlines waived the defense that it took "all necessary measures to avert the disaster or that it was impossible for it to take such measures," and thus agreed, under the International Air Transport Association (IATA) Inter-carrier Agreement, to absolute liability for compensatory damages for the international passengers.

Judge Woods ruled that punitive damages are barred in the Warsaw cases, following decisions of the Second, Eleventh, and D.C. circuits.⁵⁰ The court noted that the Eighth Circuit had not addressed the issue.

American sought leave to file third-party complaints against both the air traffic controller and the United States. Judge Woods permitted suit against the Government, but not the controller, in domestic (non-Warsaw) cases only.⁵¹ The Court ruled that there was no right of contribution for American against the United States under Arkansas law for those cases involving the passengers covered by Warsaw and the IATA agreement. Judge Woods reasoned that because the Warsaw claims arose in contract, not in negligence, and Arkansas did not recognize a right to contribution in contract cases, American could not bring contribution claims in those actions.⁵² Arkansas law does not allow for a right of contribution when one party is liable in tort and the other in contract. The court found that this law applied even though the IATA agreement reserved the right of an airline for contribution and indemnity.

The court also ruled that American's cause of action for indemnity did not arise until the claim or judgment was paid, and there was no good reason to accelerate those claims. The court did allow American to go forward with its third-party claims against the United States in the non-Warsaw cases. Judge Woods ordered the Warsaw cases to proceed to trial ahead of the general liability proceedings. The first two personal injury cases were tried to Arkansas juries in the summer of 2000.

⁵⁰ *In re Air Crash at Little Rock, Ark.*, on June 1, 1999, 109 F. Supp. 2d 1022, 1024 (E.D. Ark. 2000).

⁵¹ Because American Airlines conceded that the controller was, at all times, acting within the scope of his employment as a federal employee, the controller had complete immunity under the Federal Tort Claims Act, 28 U.S.C. § 2679. *In re Air Crash at Little Rock, Ark.*, 109 F. Supp. 2d at 1025.

⁵² *Id.*

In the first case, *Maddox v. American Airlines*, the jury returned a verdict of \$11,015,000 for a young woman who suffered burn injuries and will be unable to pursue her career as an opera singer.⁵³

In the second case, *Lloyd v. American Airlines*, the jury returned a verdict of \$6,500,000.⁵⁴ The plaintiff, another young woman, suffered minor physical injuries. Her primary damage was Post-Traumatic Stress Disorder (PTSD). At trial, American Airlines moved for judgment as a matter of law on the ground that Lloyd's PTSD was not proximately caused by physical injuries suffered in the crash, and thus, under *Eastern Airlines, Inc. v. Floyd*,⁵⁵ she could not recover damages for her PTSD under the Warsaw Convention. Judge Woods disagreed, distinguishing *Floyd* and holding that, once the threshold of liability has been crossed by a passenger in a Warsaw case (through physical injury, however minor), then all damages available under the law of the passenger's domicile are recoverable, including damages for mental injuries.⁵⁶ Although holding that a sufficient nexus between physical and mental injuries need not be established, Judge Woods nonetheless found a connection between Lloyd's physical and mental injuries because the physical injuries were "all part of a terrifying accident which led to the plaintiff's PTSD."⁵⁷ Finally, Judge Woods noted that there was evidence in the record that PTSD itself constitutes a physical manifestation of injury. According to the plaintiff's psychiatrist, studies have shown that PTSD causes biological and physical changes in brain function.⁵⁸ On December 8, 2000, Judge Woods denied American Airlines' motion for a new trial in the *Lloyd* case.

Both cases are on appeal before the Eighth Circuit on a number of issues, including whether the trial court erred in refusing to award pre-judgment interest. American is appealing the trial court's denial of its motion to file a third-party complaint seeking contribution against the United States in the Warsaw cases.

⁵³ *American Airlines Admits Negligence in Fatal Crash: But Company Fighting Punitive Damages*, DALLAS MORNING NEWS, Nov. 30, 2000, available at 2000 WL 29776098. The case number is Civ. No. 00-135.

⁵⁴ *Id.* The case number is Civ. No. 00-300.

⁵⁵ 499 U.S. 530 (1991).

⁵⁶ *Lloyd v. Am. Airlines*, 118 F. Supp.2d 916, 921 (E.D. Ark. 2000).

⁵⁷ *Id.* at 923.

⁵⁸ *Id.* at 924.

B. NON-WARSAW CASES

On November 29, 2000, American admitted that its negligence was a contributing cause of the accident. American thus agreed not to contest liability for compensatory damages in non-Warsaw cases. American continues to vigorously deny that it is responsible or liable for any punitive or exemplary damages. As of December 11, 2000, approximately one-half of the cases filed had been settled. Judge Woods scheduled damage trials in almost all remaining cases at a rate of about four cases per month running from February to July 2001.

The punitive damage trial has been postponed until the completion of all damages trials. This decision was based, in part, on the fact that many passengers had not yet filed suit and Arkansas law provides for only one punitive damage trial.

C. CLAIMS AGAINST THE UNITED STATES

American Airlines briefly brought the United States into the lawsuit as a third party defendant, alleging that the actions of the air traffic controller caused or contributed to the accident. Specifically, American Airlines alleged that the United States was partly to blame for the accident because it allegedly disseminated inaccurate information about the weather, the runway condition, and the approach. In addition to joining the United States in the federal cases, American brought third-party actions in Arkansas and Texas state courts, anticipating that the United States would remove those cases to federal court.

In the Arkansas state court cases, American filed third-party complaints against both the United States and the individual air traffic controller on duty at the Little Rock Air Traffic Control Tower at the time of the accident. The United States substituted itself for its employee and removed those cases to federal court, pursuant to the Westfall Act.⁵⁹

In the Texas state court cases, American sought leave to add the air traffic controller and the United States as third parties. The United States filed an *amicus* brief opposing the request and argued the state court lacked jurisdiction over the claims against the controller because, based on American's own allegations, he was acting within the scope of his employment at the time of the accident. The Government further argued that the state court lacked jurisdiction against the United States as a mat-

⁵⁹ Westfall Act, 28 U.S.C. § 2679 (West 1994 & Supp. 2000).

ter of law. The presiding judge denied American's request for leave to add the controller, but allowed American to file third-party complaints against the United States directly. The United States filed a motion to dismiss those complaints for lack of jurisdiction, and American non-suited the cases.

In the federal cases, the United States moved for summary judgment in lieu of an answer. The United States argued that the sole proximate cause of the accident was the negligence of American Airlines, and that the actions of the air traffic controller did not cause or contribute to the cause of the accident.

On November 29, 2000, American voluntarily dismissed the United States from the case without prejudice, and on December 5, 2000, Judge Woods signed the order dismissing the United States.

VII. SWISSAIR FLIGHT 111 (SEPTEMBER 2, 1998)

On September 2, 1998, Swissair Flight 111 crashed into the Atlantic Ocean off Peggy's Cove, Nova Scotia, killing all 229 people on board. The flight departed from JFK Airport in New York and was headed to Geneva, Switzerland. Approximately one hour after the flight departed, at 33,000 feet, the crew reported smoke in the cockpit and requested an immediate return to Boston. About one minute later, the crew changed its requested destination to Halifax, Nova Scotia. Ten minutes after first announcing "Pan, Pan, Pan," the crew declared an emergency, began dumping fuel, and stated, "[W]e have to land immediately." No further communications were received from the flight and it disappeared from radar approximately six minutes later.

The Canadian Transportation Safety Board is investigating the accident. The Board found evidence of an in-flight fire and is now focusing on where, why, and how the fire started. The investigation has identified extensive fire damage in an area above the ceiling sometimes referred to as the "attic," in the front section of the aircraft within an area extending about 1.5 meters forward and 5 meters aft of the cockpit wall. The flight suffered a near-total electrical failure five minutes prior to impact. Although the origin of the fire has not been determined, the Board believes that shortcomings in design and equipment, and crew training, awareness, procedures, and checklists may

have deterred prompt detection and suppression of this in-flight fire.⁶⁰

On December 4, 2000, the Board issued five interim aviation safety recommendations dealing with in-flight firefighting measures. In issuing the recommendations, the Board noted that approximately 20 minutes elapsed from the time the Flight 111 crew detected an unusual odor until the aircraft crashed, and about 11 minutes elapsed between the time the presence of smoke was confirmed by the crew and the time the fire was known to have begun to adversely affect the aircraft systems. The Board has announced that its final report may be issued in the spring of 2001 and will likely include new recommendations regarding aircraft wiring and insulation.⁶¹ The investigation recovered two million pieces of individual wreckage, and more than 170 miles of the MD-11's wiring. More than \$1 million in U.S. currency was recovered from the aircraft wreckage, and there may be as much as \$300 million in jewels remaining in the cargo.

The majority of the lawsuits have been filed in the United States, naming Swissair, McDonnell Douglas Corp., the Boeing Company (McDonnell's successor in interest), and Delta Air Lines, Inc., (Swissair's domestic partner) as defendants. Some lawsuits were brought and settled in Switzerland.

The U.S. cases are consolidated before Chief Judge Giles of the U.S. District Court, Eastern District of Pennsylvania for MDL proceedings. Defendants Swissair and Boeing entered into a sharing agreement and agreed not to contest liability for compensatory damages. They also filed several motions, including whether DOHSA applies to an accident that occurred in Canadian territorial waters, and whether the French and Swiss plaintiffs' claims should be dismissed on the basis of forum non conveniens. The defendants also moved to dismiss all claims for damages not recoverable under DOHSA, including claims for punitive damages.

Judge Giles has taken the motions under submission but has not yet issued rulings, seeking instead to encourage settlement through the uncertainty over the outcome of the pending motions. This approach has had some success because many of the

⁶⁰ Updates on the Canadian Transportation Board's investigation are available at <http://www.tsb.gc.ca>.

⁶¹ AVweb News Wire, *And Swissair Probe Nears End* (Nov. 6, 2000), available at <http://www.avweb.com/newswire/news0045a.html>.

cases have since settled and any ruling on the motions would, as of March 2001, apply only to a few cases. The cases are undergoing mediation before Judge Giles and other judges and magistrates in the Eastern District of Pennsylvania. The cases are presently being mediated under the assumption that DOHSA applies to this accident. Of the 215 actions, 123 have settled, and settlement negotiations are ongoing.

VIII. SILKAIR MI185 (DECEMBER 19, 1997)

On December 19, 1997, a SilkAir Boeing 737-300 suddenly plunged from cruise flight and crashed into the Musi River, killing all 104 people on board. SilkAir is the regional arm of Singapore Airlines, and was on a flight from Jakarta to Singapore when it crashed. The flight was cruising at 35,000 feet when radar controllers observed the flight enter a steep dive; the aircraft traveled at speeds in excess of Mach 1 during its dive. The weather was reportedly good, the aircraft was less than one year old, there was no evidence of terrorism, and no distress call was received. The engines were apparently developing power at the time of the crash. Indonesian authorities investigated the crash.

Some involved in the investigation have suggested a possible murder-suicide by one of the pilots.⁶² The flight data recorder and CVR were disabled before the crash, but reportedly showed no signs of "unusual behavior."⁶³

In December 2000, Indonesian authorities investigating the accident concluded that no cause could be determined "due to the highly fragmented wreckage and the nearly total lack of useful data, information and evidence."⁶⁴ The Singapore police and Indonesia's National Transportation Safety Committee issued separate statements that the pilot showed no suicidal tendencies. The final report stated that "no evidence [was] found to indicate that the performance of either pilot was adversely affected by any medical or psychological conditions."⁶⁵

In contrast, Jim Hall, then Chairman of the NTSB, stated in a letter to Indonesian authorities that the evidence developed during the investigation suggests that there was nothing

⁶² William M. Carley & Diane Brady, *If 1997 SilkAir Crash Was Suicidal, Here Might Be the Reasons*, WALL ST. J., July 30, 1998, at A1, available at 1998 WL-WSJ 3503657.

⁶³ Airwise News, *SilkAir Suicide Theory Rejected*, (Dec. 14, 2000), available at <http://news.airwise.com/stories/2000/12/976827200.html>.

⁶⁴ *Id.*

⁶⁵ *Id.*

mechanically wrong with the 737, and that "the accident can be explained by intentional pilot action."⁶⁶ He said the flight path of the aircraft strongly suggested a sustained and manual manipulation of the controls. Mr. Hall noted that the investigation showed the captain had a serious debt problem due to financial-market speculation and had experienced run-ins with airline management.⁶⁷ Mr. Hall's letter claimed that "a significant amount of pertinent factual information developed during the three-year investigation is either not discussed in the [Indonesian] report or not fully considered."⁶⁸ He added that it was probable that the captain turned off the CVR and DFDR before the crash.⁶⁹ The Indonesian authorities did not amend their report based on the letter from Chairman Hall.

The pilot was a former member of the Singapore Air Force aerobatic team. It was reported that he had taken out several large life insurance policies weeks before the accident. He also had reportedly been disciplined previously by the airline for deactivating a CVR.⁷⁰

Some lawsuits have been brought in Singapore against the airline. Approximately thirty of those cases have settled.⁷¹ SilkAir has reportedly offered \$200,000 in compensation to each family, which it hopes will settle the remaining claims.⁷²

Approximately fifty-five lawsuits are pending in the United States against Boeing, the accident aircraft's manufacturer, and other defendants, including United Airlines, ITT Aerospace Controls, Kavalico Corp., Parker Hannifin Corp., and Honeywell Inc. Those suits were originally filed in Ohio, New York, and Delaware, but were transferred by the MDL panel to Chief Judge John C. Coughenour in the Western District of Washington. Plaintiffs allege that the crash occurred due to an uncommanded rudder deflection of the 737. Plaintiffs complain that the 737's rudder was defective, similar to the allegations in the United Airlines Flight 585 accident in Colorado Springs, Colo-

⁶⁶ Don Phillips, *Pilot May Have Meant to Crash Asian Jet; 97 Silk Air Disaster "Probably" a Deliberate Act*, U.S. Prob. Says, WASH. POST, Dec. 15, 2000, at A1.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ AVweb News Wire, "Suicidal Pilot" Cause of SilkAir Crash? (Aug. 30, 1999), available at <http://www.avweb.com/newswire/news9935.html>.

⁷¹ Airwise News, *SilkAir Crash Suits Filed Against Boeing* (Dec. 8, 1999), available at <http://news.airwise.com>.

⁷² AVweb News Wire, *SilkAir Ups Compensation Offer* (Nov. 22, 1999), available at <http://www.avweb.com/newswire/news9947a.html>.

rado, and the USAir Flight 427 accident near Aliquippa, Pennsylvania. The hull insurer has also filed suit in federal court in New York against Boeing, Parker Hannifin, Honeywell, and others, alleging that defects in the 737 caused the accident.⁷³

Boeing's motion to have the cases dismissed on forum non conveniens grounds was denied by Order dated January 6, 2000. Judge Coughenour noted that courts rarely disturb the presumption in favor of a plaintiff's chosen forum, and that a defendant seeking dismissal has a substantial burden to meet.⁷⁴ The court found the two alternative forums suggested by Boeing, Indonesia and Singapore, to be adequate.⁷⁵ The court went on to hold, however, that neither the private nor public factors clearly demonstrated that the trial would be more fairly or efficiently litigated if conducted in a different forum.⁷⁶ Specifically, the court found that a significant portion of the evidence and witnesses related to the plaintiffs' theory of liability (design defect of the rudder) was in Washington, the place where the aircraft was designed. The court found that although Boeing made some showing that the evidence supporting its defense was more accessible in Indonesia or Singapore, the court did not believe the burden Boeing faced was out of proportion to the benefit afforded by plaintiffs by litigating in Washington.⁷⁷ The court further noted that at least three of the crash victims whose relatives brought claims were United States citizens. The court ruled that it must be particularly deferential to the plaintiff's choice of forum when the plaintiff is a U.S. citizen. To further justify the expenditure of public resources on this case, the court noted that the Boeing 737 carries a great number of people into and out of its district, the Western District of Washington, every day. Thus, the public interest supported keeping the suit in its district. The judge declined to address issues in Boeing's motion concerning choice of law or the applicability of DOHSA because those issues were not fully briefed or ripe for decision.

In addition, Boeing unsuccessfully sought to remove to federal court several actions pending in California state court. Al-

⁷³ Airwise News, *Silk Air Insurers Sue Boeing* (Dec. 18, 2000), available at <http://news.airwise.com/stories/2000/12/977171451.html>.

⁷⁴ *In re Air Crash Disaster Near Palembang, Indonesia* on Dec. 19, 1997, MDL No. 1276 (W.D. Wash. Jan. 14, 2000).

⁷⁵ *Id.* at 2.

⁷⁶ *Id.* at 6.

⁷⁷ *Id.* at 2-3.

though Boeing claimed that DOHSA presented federal questions, U.S. District Judge Coughenour rejected that argument as a basis for removal and remanded the cases to state court.

IX. KOREAN AIRLINES FLIGHT 801 (AUGUST 6, 1997)

On August 6, 1997, Korean Airlines Flight 801, a Boeing 747, crashed into the side of a hill three miles short of the runway at Agana, Guam, killing 229 passengers and crew members. Only twenty-six people survived. At the time of the crash, there were heavy rain showers in the area with layers of clouds and flight visibilities of one to seven miles. As Flight 801 finished crossing a portion of the Pacific Ocean, the Korean crew contacted the Guam Combined Enroute Radar Approach Control (CERAP), an FAA radar air traffic control facility that handles both en-route, high-altitude aircraft, and aircraft on approach for landing.

After providing radar vectors to position the aircraft to intercept the final approach course, the CERAP air traffic controller cleared the aircraft for an instrument approach to Runway 6 Left. Normally, this would have been an ILS approach, but the glide slope was out of service for a site upgrade. The KAL flight crew had been advised of this outage prior to the flight. The CERAP controller also reminded them of the outage as part of their approach clearance. The crew had to perform a localizer-only approach, which requires adherence to a series of "step-down" altitudes.

After positioning the aircraft to intercept the approach, the CERAP controller instructed the KAL crew to contact Agana Tower, run by independent contractor Serco under contract to the FAA, for its landing clearance. After switching communications to the tower, the flight crew began a steady descent, did not follow the step-down procedure, and struck the hilltop 3.3 miles short of the runway at an altitude of about 600 feet above Mean Sea Level (MSL) at a point where the minimum altitude for the approach was 1,440 feet MSL. The crew continued its descent, despite a number of altitude alarms and ground proximity warnings in the cockpit that should have alerted them to their unsafe proximity to the terrain.

A tool that could have alerted the CERAP controller of Flight 801's altitude deviations is the Minimum Safe Altitude Warning system (MSAW), a computerized radar feature that issues an audible and visual alert to the controller when an aircraft gets be-

low certain altitudes, which was inhibited on the day of the accident and had been so for some time prior to the accident. The facility had allegedly experienced a number of nuisance alarms and the facility manager had ordered the system inhibited.

The NTSB determined that the probable cause of the accident was "the captain's failure to adequately brief and execute the nonprecision approach and [the crew's] failure to effectively monitor and cross-check the captain's execution of the approach." The NTSB also found the FAA's "intentional inhibition of the minimum safe altitude warning system at Guam and the agency's failure to adequately manage the system" a contributing factor to the accident.

Plaintiffs sued Korean Airlines (KAL), Serco Management Services, and the United States. Suits were filed in several different U.S. District Courts, with the greatest number of suits brought in the Central District of California. The MDL panel consolidated the cases for pretrial discovery before Judge Harry L. Hupp in the Central District of California.

A. WARSAW CONVENTION ISSUES

Because most of the passengers on Flight 801 were Korean nationals traveling on round-trip tickets from Seoul, the Warsaw Convention governs the majority of the plaintiffs' claims against KAL. Early in the litigation, Judge Hupp made two significant rulings concerning the application of the Warsaw Convention to KAL.

First, Judge Hupp ruled that the Warsaw limitation on liability (\$75,000 pursuant to the Montreal Agreement) had been waived by KAL and that KAL had instead agreed to be bound by the provisions of the IATA Inter-carrier Agreement.⁷⁸ Pursuant to the IATA agreement, KAL was strictly liable for compensatory damages up to 100,000 Special Drawing Rights (SDRs), about \$135,000, and unlimited liability if it could not prove that it took all necessary measures to avoid the crash.

Second, Judge Hupp ruled that, although the Korean plaintiffs could not sue KAL directly in the United States, the provisions of the Warsaw Convention did not preclude the United States from maintaining claims against KAL for indemnity, con-

⁷⁸ *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301 (2d Cir. 2000), *cert. denied*, 150 L. Ed. 2d 716, 121 S. Ct. 2549 (2001).

tribution, and apportionment of fault.⁷⁹ KAL had moved to dismiss the indemnity and contribution claims brought by Serco and the United States, arguing that the Warsaw Convention applies to all claims, however founded, arising from an accident occurring in international transportation, and that there is no treaty jurisdiction for contribution and indemnity claims in the United States. In denying the motion, the court held that "the Convention covers only passenger injury or death claims (or the claims of freight shippers, not involved here)." The court found that the indemnity claims of Serco and the United States were independent of the passenger injury or death claims and therefore not governed by the requirements of Article 28 of the Warsaw Convention. The court observed that the "traditional use of indemnity claims has differentiated them from the basis of a personal injury claim out of which it may spring." Relying on the Sixth Circuit's decision in *Polec v. Northwest Airlines*,⁸⁰ the court found that, although the indemnity claims at issue in this litigation are separate from the claims brought on behalf of the passengers and not subject to Article 28, "to the extent that the indemnity claim is for protection from passenger damage claims which exceed the limits of liability provided under the Convention for personal injuries to passengers, the indemnity claim must be limited by the Convention to the amount that the carrier has to pay under those limits."⁸¹

B. DAMAGES ISSUES

Trial was set to begin in May 2000. Before trial commenced, however, the defendants entered into a sharing agreement, by which all plaintiffs would be paid full compensatory damages without the need for a determination on liability.

1. Venue

Under the Supreme Court decision, *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, MDL cases must be returned to their transferor courts for trials on both liability and damages.⁸² The sharing agreement avoided returning the cases for liability trials, but damage trials remained.

⁷⁹ In re Air Crash at Agana, Guam, No. 98-ml-7211, MDL No. 1237 (C.D. Cal. Jan. 25, 1999).

⁸⁰ 86 F.3d 498 (6th Cir. 1996).

⁸¹ In re Air Crash at Agana, Guam, No. 98-ml-7211, MDL No. 1237 (C.D. Cal. Aug. 18, 2000).

⁸² 523 U.S. 26 (1998).

Lawsuits against the United States under the Federal Torts Claims Act (FTCA)⁸³ may be brought only in the judicial district where the plaintiff resides or where the alleged act or omission occurred.⁸⁴ With a few exceptions, plaintiffs did not reside in the Central District of California. The United States filed a motion to dismiss, or in the alternative, to transfer all of the cases filed in the Central District of California to the District of Guam for damage trials.

The court granted the request that the cases be transferred to the District of Guam upon completion of pretrial proceedings in the Central District.⁸⁵ The court found that the United States had not waived its venue objection by participating in discovery in the Central District because the MDL panel pursuant to statute, mandated it. Similarly, Judge Hupp ruled that the United States did not waive its venue objection by agreeing to participate in the liability trial in the Central District.

Lastly the court found that "weight of the contacts," not the "substantial contacts," test was the appropriate test to determine whether venue can lie in more than one district in an FTCA case. Plaintiffs argued that some activity relating to FAA negligence had taken place at the FAA's regional office in Los Angeles and amounted to substantial contacts sufficient to lay venue in the Central District. Using the weight-of-the-contacts test, the court found that venue lies in the District of Guam.

Fifteen cases have not been settled and remain subject to the transfer order. These cases will be transferred once pretrial matters have been completed in the Central District. The remaining cases will stay in the Central District, but will likely be assigned to other judges for trial.

2. *Choice of Law*

The threshold damages issue concerned which law would apply to individual cases. Plaintiffs argued for the application of Guam law, while the defendants argued for the application of Korean law. Under Korean law, courts generally cap non-economic damages in wrongful-death cases at \$45,000.

Judge Hupp noted that foreign law may be defined as what foreign courts actually do in particular situations, and ruled that

⁸³ Federal Tort Claims Act, 28 U.S.C. § 1346(b) (West 1994 & Supp. 2000).

⁸⁴ *Id.* § 1402(b).

⁸⁵ *In re Air Crash at Agana, Guam*, No. 98-ml-7211, MDL No. 1237 (C.D. Cal. Aug. 18, 2000).

Korean law applied to damages issues where the victim was a Korean domiciliary.⁸⁶

In coming to his decision, Judge Hupp considered the choice-of-law rules for both California and Guam. He applied Guam's choice-of-law rules to the cases originally filed in Guam and to all cases involving the United States. Guam follows the Restatement of Conflicts approach to choice of law—the “most significant relationship” test. Applying that test, the court held that Korean law would apply to damages issues for Korean decedents and their heirs.

The court found that the laws of Korea were broader in scope concerning the range of permissible claimants. For example, Korean law provides for claims to be brought on behalf of the decedent, the decedent's heirs, and other persons who suffer an economic or emotional loss. The range of permissible plaintiffs in Guam would have been much smaller.

The parties then submitted briefs on Korean damages law, supported by affidavits from Korean legal experts. Judge Hupp synthesized these into a primer. The primer outlines the methodology Korean courts use to determine proper claimants and to calculate economic and non-economic damages in wrongful death and personal injury cases. The primer is intended to serve as “a framework” for use by the judges presiding over future damages trials.

The parties submitted proposed jury instructions based on Judge Hupp's primer. A hearing on those instructions was held in February 2001.

As of February 2001, most of the cases have been through some type of mediation and approximately 30 cases of the 160 remain on track for trial on damage issues only. Of those thirty remaining cases, ten are crew cases.

X. TRANSPORTES AEREOS REGIONAIS (OCTOBER 31, 1996)

On October 31, 1996, a Transportes Aereos Regionais (TAM) Fokker F100 crashed shortly after departing the airport at Sao Paulo, Brazil. An uncommanded deployment of the thrust reversers on the right engine is alleged to have caused the accident, which killed ninety passengers, six crewmembers, and eight persons on the ground.

⁸⁶ In re Air Crash at Agana, Guam, No. 98-ml-7211, MDL No. 1237 (C.D. Cal. Oct. 13, 2000).

Over sixty cases arising from this accident have been filed in California and New York state courts. Named as defendants in those cases are TAM, Fokker Aircraft B.V., and other Fokker entities: Northrop Grumman, Teleflex Control Systems, Inc., and Safe Flight Instrument Corp. Northrop Grumman, Teleflex, and Safe Flight manufactured the thrust reverser and certain component parts. TAM has moved to dismiss the cases on the grounds that it does not do business in New York. Plaintiffs have opposed the motion. The California state court granted one defendant's motion for forum non conveniens of the Brazilian domiciliaries to Brazil, and those cases have been stayed in the California courts. Some discovery has been completed, including depositions of Northrop Grumman and TAM personnel. One case is still pending against Northrop and Teleflex in a California state court, and Fokker and TAM have been named as third-party defendants. Depositions are being taken in this case, but no trial date has been set. Additionally, a number of cases have been filed against TAM in Brazil.

XI. TRANS WORLD AIRLINES FLIGHT 800 (JULY 17, 1996)

The two most significant events last year in the TWA Flight 800 litigation involve DOHSA: (1) the U.S. Court of Appeals for the Second Circuit affirmed the decision of the district court, which held that DOHSA is not applicable to the action because the crash occurred within federal territorial waters; and (2) on April 5, 2000, President Clinton signed into law an amendment to DOHSA permitting families to recover compensation for non-economic losses including care, comfort, and companionship. The amendment was retroactive to July 16, 1996, the day before the TWA Flight 800 crash.

TWA Flight 800 exploded approximately ten minutes after taking off from JFK International Airport in New York, bound for Paris and Rome. The explosion caused the plane to break apart in midair and crash into the Atlantic Ocean, approximately eight nautical miles off the shore of Long Island. All 230 passengers and crewmembers were killed.

The NTSB determined that the probable cause of the accident was the explosion of the center wing fuel tank (CWT), resulting from the ignition of the flammable fuel/air mixture in

the tank.⁸⁷ The NTSB could not determine the source of ignition energy for the explosion, but noted that the most likely source was a “short circuit outside of the CWT that allowed excessive voltage to enter it through electrical wiring associated with the fuel quantity indication system.”⁸⁸

MDL cases are consolidated before U.S. District Judge Robert Sweet in the Southern District of New York. The defendants are TWA, Boeing, and, in some cases, the fuel-pump manufacturer, Hydroaire, Inc.

A. THE SECOND CIRCUIT DECISION

In July 1997, the defendants moved to dismiss all the plaintiffs’ claims for non-pecuniary damages. The basis for the motion was DOHSA, which limits a plaintiff’s recovery to pecuniary losses where a death occurs on the high seas beyond a marine league from shore. Judge Sweet denied the motion, ruling that DOHSA did not apply to the case.⁸⁹ The Second Circuit affirmed.⁹⁰

DOHSA was enacted in 1920 to provide a cause of action for wrongful deaths occurring “on the high seas beyond a marine league” from the United States territorial shores.⁹¹ The purpose of the law was to create a remedy where none existed. Maritime law did not recognize a cause of action for wrongful death. The law limited damages to “a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought.”⁹² Courts eventually applied the law to aviation cases.

The Second Circuit interpreted “high seas” and “beyond a marine league” to have independent meaning, ruling that both must be met in order for DOHSA to apply.⁹³ The parties agreed that Flight 800 crashed beyond a marine league from the coast of Long Island, but disputed whether the crash was “on the high

⁸⁷ *Aircraft Accident Report: In-flight Breakup Over the Atlantic Ocean, Trans World Airlines Flight 800, Boeing 747-131, N93119, Near East Moriches, New York, July 17, 1996*, available at <http://www.nts.gov/Publictn/2000/aar0003.htm>.

⁸⁸ *Id.*

⁸⁹ *See In re Air Crash Off Long Island, New York*, on July 17, 1996, 1998 WL 292333 (S.D.N.Y. June 2, 1998).

⁹⁰ *In re Air Crash Off Long Island, New York*, on July 17, 1996, 209 F.3d 200 (2d Cir. 2000).

⁹¹ 46 U.S.C. app. § 761 (1994).

⁹² *Id.* app. § 762.

⁹³ *In re Air Crash Off Long Island, New York*, 209 F.3d at 200.

seas." The court rejected the defendants' argument that "high seas" refers to all waters beyond the low-water mark, ruling that "high seas" means those waters beyond the territorial waters of the United States.

Under Presidential Proclamation No. 5928, issued in 1988 by President Reagan, the territorial waters of the United States extend twelve miles from the shore of the United States. As the crash occurred eight miles from the shore, it was within the United States' territorial waters, rather than on the "high seas." Thus, DOHSA did not apply.

The Second Circuit's decision that Flight 800 crashed within federal territorial waters allows the plaintiffs to pursue their remedies under state law.

B. THE 2000 AMENDMENTS TO DOHSA

After the accident, families began lobbying Congress to change the damage limits of DOHSA. On April 5, 2000, the amendments became law, retroactive to July 16, 1996, the day before the TWA Flight 800 crash. The amendment provides as follows:

In the case of a commercial aviation accident, whenever the death of a person shall be caused by a wrongful act, neglect, or default occurring on the high seas 12 nautical miles or closer to the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, this Act shall not apply and the rules applicable under Federal, State, and other appropriate law shall apply.⁹⁴

If, however, "the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States, additional compensation for non-pecuniary damages for wrongful death of a decedent is recoverable."⁹⁵ These non-pecuniary damages are defined as "damages for loss of care, comfort, and companionship."⁹⁶

The amendment ends the DOHSA economic damage limitation for commercial aviation disasters. Plaintiffs from TWA Flight 800 and later commercial aviation disasters on the high seas will be able to obtain a recovery for both economic and

⁹⁴ 46 U.S.C.A. app. § 761(b).

⁹⁵ *Id.* app. § 761.

⁹⁶ *Id.*

non-economic losses. Since these changes in the law, many of the TWA Flight 800 cases have settled and settlement negotiations in most other cases are actively proceeding.

C. OTHER LITIGATION EVENTS

Defendants moved to dismiss each action arising from the death of a French domiciliary on *forum non conveniens* grounds. The defendants promised the judge that they would not contest liability for full compensatory damages in the courts of France if the judge would grant the motion. Though noting that their motion was a “well-crafted attempt to avoid some of the more obvious legal barriers to a motion to dismiss on *forum non conveniens* grounds,” Judge Sweet denied the motion because plaintiffs chose the forum and because public interest factors favored retaining the actions in the United States.⁹⁷

XII. AMERICAN AIRLINES FLIGHT 965 (DECEMBER 20, 1995)

On December 20, 1995, American Airlines Flight 965 crashed into terrain while the crew was attempting to maneuver the aircraft onto an approach to the Alfonso Bonilla Aragon Airport at Cali, Colombia. One hundred and fifty-one passengers, both pilots, and all six cabin crewmembers died in the crash. Four persons sustained nonfatal injuries.

Following last year’s reversal of the trial court’s summary judgment ruling in favor of the plaintiffs,⁹⁸ all the plaintiffs’ cases have settled.

In April 2000, American Airlines went to trial against Honeywell, Inc., and Jeppesen Sanderson, Inc., seeking contribution. Honeywell supplied the aircraft’s flight management computer (FMC). Jeppesen provided the navigational database programmed into the FMC and the corresponding aviation charts. American Airlines alleged that a problem with “duplicate codes” in the FMC contributed to the accident.

⁹⁷ *In re Air Crash Off Long Island New York*, on July 17, 1996, 65 F. Supp. 2d 207, 218 (S.D. N.Y. 1999).

⁹⁸ *Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1290 (11th Cir. 1999) (holding that the 1999 Montreal Protocol No. 4 clarifies the definition of willful misconduct under Article 25 of the Warsaw Convention, rather than effecting a substantive change in the law, and thus applied to this 1995 accident; case remanded to determine whether the pilots knew the flight was significantly off course), *cert. denied*, 528 U.S. 1136 (2000).

On June 13, 2000, a federal jury in the Southern District of Florida decided that American Airlines was 75% at fault for the crash, Jeppesen was 17% at fault, and Honeywell was 8% at fault.⁹⁹ Honeywell and Jeppesen recently settled with American, although initially they argued for a new trial and complained that American Airlines' extreme misconduct in the early stages of the case led to unreasonably high settlements.¹⁰⁰

The jury apparently credited American Airlines' claim that Jeppesen fraudulently concealed a problem with the database. In support of its claims against Jeppesen and Honeywell, American showed that Jeppesen had been aware of the "duplicate code" problem for more than five years. American argued that Jeppesen and Honeywell had fixed twenty-two of the ninety-five code problems in the database before the accident, but had not told the airlines that the flaws existed.

XIII. PAN AM 103 (DECEMBER 21, 1988)

A. CRIMINAL ACTION

On December 21, 1988, Pan Am Flight 103, a Boeing 747, exploded over Lockerbie, Scotland after a bomb on board the aircraft detonated. The flight was en route from London Heathrow Airport to John F. Kennedy International Airport. All 259 persons in the aircraft and 11 people on the ground were killed.

Twelve years later, on January 31, 2001, a Scottish court found one Libyan man guilty for the bombing of Pan Am Flight 103. Charges were brought against two defendants, both former employees of Libyan Arab Airlines. Senior Libyan intelligence agent Abdel Basset Ali al-Megrahi was convicted, while Lamén Khalifa Fhimah was acquitted. Pursuant to Scottish law, Megrahi was sentenced to life in prison but will be eligible for parole after 20 years.

Over a period of nine months, Scottish prosecutors brought 232 witnesses to testify before the special court in the Nether-

⁹⁹ Scott McCartney, *Miami Jury Finds Firms Partly Liable in Colombia Crash*, WALL ST. J., June 14, 2000, at B14, available at 2000 WL-WSJ 3032875.

¹⁰⁰ Ina Paiva Cordle, *Onboard Computer Makers Reach a Settlement with American Airlines about Crash*, KNIGHT-RIDDER TRIB. BUS. NEWS, Sept. 16, 2000, available at 2000 WL 26753118.

lands on a former U.S. airbase.¹⁰¹ Although the judges found several witnesses to be unreliable, the forensic evidence that the bomb was first loaded onto a plane in Malta before being transferred to the Pan Am flight convinced them. Key evidence included the testimony of a Libyan official who issued Megrahi a coded passport in an alias on the orders of the Libyan Government, as well as the testimony of a Maltese shopkeeper who tentatively identified Megrahi as the purchaser of a distinctive set of clothes that came from the suitcase that housed the bomb.¹⁰² On February 7, 2001, Megrahi filed a notice of appeal with the Scottish High Court in Edinburgh, Scotland.¹⁰³

Libyan leader Moammar Gaddafi declared he would not pay compensation to the victims' families or acknowledge official responsibility for the 1988 bombing of Pan Am Flight 103.¹⁰⁴ After the verdict, Gaddafi called the case "a farce."¹⁰⁵

B. CIVIL ACTIONS

1. *Plaintiffs vs. Pan Am*

In July 1992, after a lengthy liability trial against Pan Am in the United States District Court for the Eastern District of New York, a jury found that Pan Am had committed acts of "willful misconduct" which contributed to the crash, thus removing the \$75,000 damage limit under the Warsaw Convention. The liability finding was affirmed on appeal.¹⁰⁶ All claims against Pan Am have been resolved by trial or settlement.

2. *Plaintiffs vs. Libya*

In 1994, plaintiffs brought suit in the Eastern District of New York against the Socialist People's Libyan Arab Jamahiriya, the Libyan External Security Organization, the Libyan Arab Air-

¹⁰¹ Kevin Whitelaw & Thomas K. Grose, *Pinning Blame for a Terrorist Massacre Split Verdict in the Pan Am 103 Bombing Trial*, 130 U.S. NEWS & WORLD REPORT 6 (Feb. 12, 2001), available at 2001 WL 6319667.

¹⁰² *Id.*

¹⁰³ Rachel Blackburn & Hugh Dougherty, *Lockerbie Bomber Lodges Appeal*, WORLD NEWS CONNECTION, Feb. 7, 2001, available at 2001 WL 12261308.

¹⁰⁴ Howard Schneider, *Lockerbie Defendant Embraced by Gaddafi; Libyan Rejects Blame, Redress for Victims*, WASH. POST, Feb. 2, 2001, at A01.

¹⁰⁵ Sarah El Deeb, *Gadhafi Fails on Lockerbie Evidence*, ASSOCIATED PRESS, Feb. 5, 2001, available at 2001 WL 11950044.

¹⁰⁶ *In re Air Disaster at Lockerbie Scot.*, on Dec. 21, 1988, 37 F.3d 804 (2d Cir. 1994), cert. denied sub nom. *Pan Am. World Airways, Inc. v. Pagnucco*, 513 U.S. 1126 (1995).

lines, and the two individuals who were defendants in the criminal action. The complaints alleged that Libya and its agents were responsible for the bombing. The trial court granted Libya's motion to dismiss for lack of subject matter jurisdiction,¹⁰⁷ and the Second Circuit affirmed.¹⁰⁸

In 1996, however, Congress amended the Foreign Sovereign Immunities Act (FSIA) to provide, in part, that foreign states are no longer immune from personal injury or wrongful death actions arising from aircraft sabotage if they have been designated as state sponsors of terrorism.

Shortly after the amendment, plaintiffs again sued Libya and others, making substantially similar allegations to those that had previously been dismissed. Libya again moved to dismiss the case, asserting, among other things, that the 1996 amendment to the FSIA was unconstitutional. Judge Platt denied the motion, holding that: (1) the amendment was constitutional; (2) personal jurisdiction over Libya existed; (3) the designation of a state as sponsor of terrorism for purposes of the FSIA did not violate due process; (4) the amendment was rationally related to a legitimate governmental purpose; and (5) the amendment did not constitute an impermissible *ex post facto* law.¹⁰⁹

Libya appealed and the Second Circuit affirmed the trial court's subject matter jurisdiction determination. All other aspects of the interlocutory appeal were dismissed "for want of appellate jurisdiction."¹¹⁰ The Supreme Court denied certiorari in June 1999,¹¹¹ and the case was returned to Judge Platt for trial.

Currently, more than 100 plaintiffs have their cases consolidated before Judge Platt. After its return from the appellate court, Judge Platt stayed the case pending the outcome of the criminal proceedings in the Netherlands. In February 2001, after the criminal verdict was entered, the plaintiffs asked Judge Platt to enter default judgment against Libya because of Libya's failure to produce documents in discovery.¹¹² Judge Platt de-

¹⁰⁷ *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306 (E.D. N.Y. 1995).

¹⁰⁸ *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996).

¹⁰⁹ *Rein v. Socialist People's Libyan Arab Jamahiriya*, 995 F. Supp. 325, 327, 332 (E.D.N.Y. 1998).

¹¹⁰ *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 764 (2d Cir. 1998).

¹¹¹ *Socialist People's Libyan Arab Jamahiriya v. Rein*, 527 U.S. 1003 (1999).

¹¹² Pat Milton, *Lockerbie Families Want A Default*, ASSOCIATED PRESS, Feb. 2, 2001, available at 2001 WL 11949446.

clined to enter default judgment.¹¹³ The next status conference was set for April 2001. The plaintiffs hope to have a trial and/or judgment before the end of the year.

3. *Insurance Companies vs. Libya*

In December 1998, the insurers of Pan Am and Alert Management Systems filed suit in federal court in the District of Columbia against Libya and its various agencies, instrumentalities, and agents. The complaint seeks indemnity, restitution and unjust enrichment, and contribution for amounts paid by plaintiffs to those killed or injured in the bombing and for the costs of defending the prior litigation.

Defendants moved to dismiss the claims, asserting various jurisdictional defenses and failure to state a claim upon which relief could be granted. Among other things, defendants contended that 28 U.S.C. § 1605(a)(7) conferred jurisdiction only in suits for personal injury or death brought by natural persons who were nationals of the United States.

In September 1999, Judge Thomas F. Hogan denied the defendants' motion.¹¹⁴ The court ruled that third-party actions for indemnity or contribution were consistent with the principal statutory purpose of the FSIA, which is to deter foreign states from sponsoring terrorist activities.¹¹⁵ The court also held that it had personal jurisdiction over the defendants, and that the insurance companies' complaints stated valid claims for indemnification, restitution and unjust enrichment, and contribution.¹¹⁶ This case has not been set for trial, as all proceedings were stayed pending the outcome of the criminal proceedings in the Netherlands.

¹¹³ *Id.*

¹¹⁴ Hartford Fire Ins. Co. v. Socialist People's Libyan Arab Jamahiriya, Civil No. 98-3096, 1999 U.S. Dist. LEXIS 15035 (D.D.C. Sept. 23, 1999).

¹¹⁵ *Id.* at *8-*9.

¹¹⁶ *Id.* at *10-*18.

